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IN THE

Supreme Court of the United States

October Term 1952

No. 714

RED TOP BREWING COMPANY,

Petitioner,

—against—

LEONARD HENRY GEORGE MAZZOTTI and HULL UNDERWRITERS ASSOCIATION, LTD.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JESSE CLIMENKO
Counsel for Petitioner

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STATUTE CITED:

New York State Insurance Law,
Subdivisions 2, 3, Section 150 2

OTHER AUTHORITY CITED:

1 Arnould, Marine Insurance (13th Ed.), Secs. 55, 531, 637 7

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—against—

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Red Top Brewing Company, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on February 9th, 1953.

Opinions Below

The opinion of the District Court (R. fols. 1024-1038) is reported in 107 Fed. Supp. 921. The opinion of the Circuit Court of Appeals (R. fols. 356-358) is not reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on February 9th, 1953 (R. fols. 359-360). The jurisdiction of this Court is invoked under 28 U. S. C., §1254 (1).

Questions Presented

1. In an action to recover upon policies of insurance against loss due to condemnation by the United States Pure Food and Drug Administration, did the Trial Judge, whose action was affirmed by the Circuit Court of Appeals, err in setting aside a jury verdict against the underwriters and dismissing the complaint upon the grounds that there had been a breach of warranty that a certificate had been issued immediately before shipment specifying that the insured goods were clean, free of foreign matter and insects, edible and fit for human consumption, where:

(a) The certificates which were issued, on their face, complied with the warranty as reasonably construed;

(b) Extrinsic evidence established that such certificates as were issued, in the light of the procedure and practice of the issuing agency, strictly complied with the warranty.

2. Does §150 (2) of the Insurance Law of the State of New York apply to the risk referred to in item "1" above, so that a breach of warranty relating to the said risk would not avoid the policies in issue unless such breach materially increased the risk of loss?

Statutes Involved

The pertinent statutory provisions are printed in Appendix, *infra* (pp. 11-12).

Statement

On August 13, 1946 two policies of insurance were issued by respondents, naming petitioner as the assured (fols.

217-220, Exs. 2 and 3). One policy was issued by respondent Mazzotti, in the amount of $41,456, and the other was issued by respondent Hull Underwriters Association, Ltd., in the amount of $27,640 (fols. 217-220, Exs. 2 and 3).

These policies, issued pursuant to a prior Memorandum of Provisional Insurance dated July 24, 1946 (fol. 213, Ex. 1), effected an aggregate insurance coverage of $69,095 for 6000 bags of Casava Meal shipped on board the S.S. Vitorialoide from Brazil to New York (Exs. 2 and 3). Among the risks covered by the policies was the risk that the Casava Meal might be condemned by the U. S. Pure Food and Drug Administration (fol. 169). The premium based on 10% of the value, amounting to $6,909.50, was paid (fols. 165, 216).

Each of the policies contained the following provision:

> "Warranted Brazilian Department Agriculture and/or Lloyds and/or Board Underwriters, New York, and/or Sociedad Brasiliera de Superintendencia de Embarques e Descargas Limitada certificate issued immediately prior to shipment specify merchandise is clean, free of foreign matter and insects, edible and fit for human consumption, and such certificate shall be deemed underwriters admission sound condition" (fols. 221-222).

A substantially similar provision appeared in the prior Memorandum of Provisional Insurance pursuant to which the policies were issued (Ex. 1).

When the insured Casava Meal arrived in New York, it was condemned by the U. S. Food and Drug Administration because it consisted of a filthy, putrid or decomposed substance and was otherwise unfit for food, due particularly to insect infestation (fol. 225, Ex. 4). The U. S. Food and Drug Administration ordered the Casava Meal to be

destroyed or re-exported (fol. 168). The Casava Meal was sold for re-export and the net proceeds of this sale were paid to petitioner (fols. 147, 168) and credited against petitioner's claim (fol. 225).

A claim for the loss occasioned by the condemnation was filed in accordance with the provisions of the policies (fols. 99-100, 111-113). In support of this claim there was submitted a document which had been issued by the Brazilian Department of Agriculture under date June 28, 1946, entitled "Certificado de Origen e de Sanidado Vegetal" (Certificate of Origin and Vegetable Health) (fols. 99-100, 111-113).

This certificate, bearing number 347, is dated June 28, 1946. The Casava Meal was shipped from Brazil on June 29, 1946 (fol. 698). Certificate 347, which is in Portugese, states that the Casava Meal is free from dangerous plagues or diseases and is for human consumption (fols. 937-939, Ex. 7-A).

The appellant's claim under the policies was rejected on the stated ground that there had not been literal compliance with the warranty in the policies that a certificate had been issued immediately prior to shipment "specifying merchandise is clean, free of foreign matter and insects, edible and fit for human consumption" (fols. 102, 114, 149, 150, 156, 157).

Depositions of three officials of the Department of Agriculture of Brazil, taken in Brazil by written interrogatories and cross-interrogatories, established that:

(1) A second certificate, bearing No. 11522, was issued by another section of the Brazilian Department of Agriculture (fols. 249, 250-253) on June 28, 1946, which was the same day that certificate 347 was issued (fols. 232, 249, 250, 253, 323, 327, 340, 714 and 715).

(2) Certificate 11522 does not contain any express statement as to the condition of the meal. At that time, however, it was the practice of the issuing agency to issue a certificate in that form when it was intended to certify that the goods had been tested and found to be fit for human consumption (fols. 398, 765).

(3) The words set forth in certificate 347, *viz.*, "Description of vegetables or parts of vegetables—mandioca flour for human consumption", in the light of the practice of the issuing agency, signify that the flour is clean and fit for human consumption (fols. 338, 339, 383, 384, 782).

(4) The meal was inspected immediately prior to shipment, by both microscopic and sensory examination, and was found to be clean, free of foreign matter and insects, edible and fit for human consumption (fols. 247, 697, 723, 779, 780, 785).

The authorship of the language of the warranty is in dispute, but would appear to have originated with the underwriters (Ex. 10).

By pre-trial order the petitioner's damages were fixed at $67,065.17, except that respondents claimed a credit for $47,500, reducing petitioner's loss, in the event that such credit were allowed, to $14,102.77. The facts and issues relative to this claimed credit are not material to the merits of this petition for certiorari and will therefore not be further dealt with at this time.

On November 26, 1951 a unanimous verdict in favor of plaintiff was rendered by the jury. By order of Honorable William Bondy, U. S. District Judge, dated May 6, 1952, the verdict of the jury herein was set aside, the complaint dismissed and judgment accordingly ordered entered. Such judgment entered May 19, 1952 was affirmed by the United States Court of Appeals for the Second Circuit by judgment entered the 9th day of February, 1953.

Specifications of Errors to be Urged

The United States Court of Appeals for the Second Circuit erred:

1. In holding that, in construing the nature and character of the performance required by the warranty, it must be read literally.

2. In holding that the issued certificates on their face fail to comply with the warranty, as reasonably construed.

3. In holding that the trier of fact could not consider extrinsic evidence tending to establish that according to the practice and procedure of the Brazilian Department of Agriculture the issued certificates certify that the meal was in fact clean, free of foreign matter and insects, edible and fit for human consumption.

4. In failing to hold that Section 150 (2) of the Insurance Law of the State of New York applies to the risk insured against and that unless the breach of warranty asserted materially increased the risk of loss the contract of insurance was not avoided.

5. In holding that, as a matter of law, petitioner has no cause of action.

6. In affirming the judgment of the District Court.

Reasons for Granting the Writ

The decision of the court below is believed to be erroneous and probably in conflict with local decisions on important questions of local law.

In determining whether there has been compliance with a warranty it is first necessary to ascertain the nature

and character of the performance required by the warranty. In the resolution of this inquiry, the agreement of insurance is construed in accordance with the same principles of construction that are applicable to mercantile instruments generally, and it is not construed strictly or literally. *1 Arnould, Marine Insurance* (13th Ed.), Secs. 55, 637. Compare *Shamrock Towing Co.* v. *American Insurance Co.*, 9 Fed. (2d) 57, 60 (C. C. A. 2d).

After the nature or character of the performance required by the warranty is ascertained in accordance with the usual rules of construction, the second inquiry is directed to the question whether the required performance has been fulfilled. It is in connection with this second inquiry that a warrantor (in the absence of contrary statute) has been held to literal or strict performance. See *1 Arnould, Marine Insurance* (13th Ed.), Sec. 531; *Shamrock Towing Co.* v. *American Insurance Co., supra.*

A crucial question in this case is whether the warranty herein required a certificate which on its face contained the words "clean, free of foreign matter and insects, edible and fit for human consumption", or whether the warranty would be satisfied by a certificate, the meaning of which, in whatever words or symbols expressed, is that the merchandise is of that quality.

The law is well settled that an insurance policy which is susceptible of varying constructions will be construed against the insurer and in a manner tending to avoid a forfeiture.

Henjes v. *Aetna Ins. Co.*, 132 Fed. (2d) 715 (C. C. A. 2d);

J. F. Luckenbach, The, 65 Fed. (2d) 570 (C. C. A. 2d);

Zeig v. *Massachusetts Bonding & Ins. Co.*, 23 Fed. (2d) 665;
Ohio Casualty Ins. Co. v. *Miller*, 29 Fed. Supp. 993 (D. C., Mich.);
Whiteside v. *Insurance Company of the State of Pennsylvania*, 274 App. Div. 36;
McMartin v. *The Fidelity & Casualty Company of New York*, 239 App. Div. 296;
Tice Towing Line v. *Western Assurance Co.*, 216 App. Div. 202;
Zivitz v. *Maryland Casualty Co.*, 192 App. Div. 83;
Chodorow v. *Berkshire Mutual Fire Ins. Co.*, 186 Misc. 512;
Giambalvo v. *The Pheonix Insurance Company, etc.*, 178 Misc. 887;
Columbia Trust Company v. *Norske Lloyd Insurance Company, Ltd.*, 100 Misc. 550, aff'd 183 App. Div. 896.

The courts below have construed the warranty above quoted as requiring that the certificate offered in compliance specify on its face, and without recourse to extrinsic evidence, that the goods were "clean, free of foreign matter and insects, edible and fit for human consumption." Manifestly, to so construe the warranty would work a forfeiture and would be contrary to the aforementioned well settled law.

A certification in any form, attesting to the required state of facts, would obviously satisfy the intended purpose of the warranty. Certificate No. 347, stating that the merchandise is free from dangerous plagues or diseases, for human consumption, on its face substantially satisfies the language of the warranty. Moreover, the Brazilian au-

thorities unequivocally testified that, in the light of the practice and procedures of the issuing agencies, Certificates numbered 11522 and 347 actually mean that the goods on inspection were found to be "clean, free of foreign matter and insects, edible and fit for human consumption." On this point the Circuit Court of Appeals in its opinion stated, "In his charge, the judge left it to the jury to determine whether the wording of the Certificate meant what the warranty required. The jury found that it did. There is some evidence to support the conclusion that such was the meaning to the Brazilian officials." The District Court, in setting aside this finding of the jury and dismissing the complaint, and the Circuit Court of Appeals, in sanctioning such action, have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

But even if it be assumed that the certificates in evidence did not comply with the warranty, it is submitted that pursuant to Subdivision 2, Section 150 of the Insurance Law of the State of New York, unless such breach materially increased the risk of loss, the underwriters' liability is not avoided. The burden of proving a material breach of warranty which operates to forfeit the policy is on the insurers.

Hartford Fire Ins. Co. v. *Morris,* 27 Fed. (2d) 508 (C. C. A. 6th);

Scharlach v. *Pacific Mut. Life Ins. Co.,* 9 Fed. (2d) 317 (C. C. A. 5th);

Kline Bros. & Co. v. *Royal Ins. Co.,* 192 Fed. 378 (C. C. N. Y.);

Mattson v. *Connecticut Fire Ins. Co. of Hartford,* 80 Fed. Supp. 101 (D. C. Minn.);

There has been no determination that the underwriters have sustained such burden of proof. However, the courts below have held that the risk insured against was a marine risk as defined in Subdivision 3, Sec. 150 of the Insurance Law of the State of New York, and that therefore Subdivision 2 is inapplicable.

It is significant to note that Hon. Jerome N. Frank, writing the opinion below, stated that "on this issue, the writer of this opinion has some doubts which a majority of the court does not share."

Clearly, the questions presented are of importance in the future determination of rights and liabilities arising out of insurance contracts. It is plainly in the public interest that the issues here in dispute be settled.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

JESSE CLIMENKO
Counsel for Petitioner

Dated: April , 1953.

APPENDIX

INSURANCE LAW OF THE STATE OF NEW YORK

§150. *Warranty defined; effect of breach*

1. The term "warranty" as used in this section, means any provision of an insurance contract which has the effect of requiring, as a condition precedent to the taking effect of such contract or as a condition precedent to the insurer's liability thereunder, the existence of a fact which tends to diminish, or the non-existence of a fact which tends to increase, the risk of the occurrence of any loss, damage, or injury within the coverage of the contract. The term "occurrence of loss, damage, or injury" shall be deemed to include the occurrence of death, disability, injury, or any other contingency insured against, and the term "risk" shall be deemed to include both physical and moral hazards.

2. No breach of warranty shall avoid an insurance contract or defeat recovery thereunder unless such breach materially increased the risk of loss, damage or injury within the coverage of the contract. If the insurance contract specified two or more distinct kinds of loss, damage or injury which are within its coverage, no breach of warranty shall avoid such contract or defeat recovery thereunder with respect to any kind or kinds of loss damage or injury other than the kind or kinds to which such warranty relates and the risk of which is materially increased by the breach of such warranty.

3. Nothing contained in this section shall affect the express or implied warranties under a contract of marine insurance in respect to, appertaining to or in connection

with any and all risks or perils of navigation, transit, or transportation, including war risks, on, over or under any seas or inland waters, nor shall it affect any provision in an insurance contract requiring notice, proof or other conduct of the insured after the occurrence of loss, damage or injury.